

Part Two

Detailed Instructions on the Treatment of Foreign Nationals

The instructions in this booklet should be followed by all federal, state, and local government officials, whether law enforcement, judicial, or other, insofar as they pertain to foreign nationals subject to such officials' authority or to matters within their competence. These instructions relate to the arrest and detention of foreign nationals, deaths of foreign nationals, the appointment of guardians for minors or incompetent adults who are foreign nationals, and related issues pertaining to the provision of consular services to foreign nationals in the United States. They are intended to ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments.

The instructions in this booklet are based on international legal obligations designed to ensure that governments can assist their nationals who travel abroad. While these obligations are in part matters of "customary international law," most of them are set forth in the Vienna Convention on Consular Relations ("VCCR"), and some are contained in bilateral agreements, conventions, or treaties (*i.e.*, agreements between the United States and just one other country). The agreements discussed herein have the status of treaties for purposes of international law and Article VI, clause 2 of the Constitution of the United States ("all treaties made . . . shall be the supreme law of the land"). They are binding on federal, state, and local government officials to the extent that they pertain to matters within such officials' competence.

These instructions focus primarily on providing consular notification and access with respect to foreign nationals arrested or detained in the United States, so that their governments can assist them. The obligations of consular notification and access apply to United States citizens in foreign countries just as they apply to foreign nationals in the United States. When U.S. citizens are arrested or detained abroad, the United States Department of State seeks to ensure that they are treated in a manner consis-

tent with these instructions, and that U.S. consular officers can similarly assist them. It is therefore particularly important that federal, state, and local government officials in the United States comply with these obligations with respect to foreign nationals here.

These instructions also discuss obligations relating to deaths of foreign nationals, to the appointment of guardians for foreign nationals who may be minors or incompetent adults, and to foreign aircraft or ship wrecks. Like the obligations of consular notification and access, these are mutual obligations that also apply abroad.

The Department of State appreciates the continued cooperation of federal, state, and local law enforcement agencies in helping to ensure that foreign nationals in the United States are treated in accordance with these instructions. Such treatment will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad.

Arrests and Detentions of Foreign Nationals

Whenever a foreign national is arrested or detained in the United States, there are legal requirements to ensure that the foreign national's government can offer him/her appropriate consular assistance. *In all cases, the foreign national must be told of the right of consular notification and access. In most cases, the foreign national then has the option to decide whether to have consular representatives notified of the arrest or detention. In other cases, however, the foreign national's consular officials must be notified of an arrest and/or detention regardless of the foreign national's wishes. Whenever a foreign national is taken into custody, the detaining official should determine whether consular notification is at the option of the foreign national or whether it is mandatory.* A list of all embassies and consulates in the United States, with

their telephone and facsimile numbers, is included in this booklet to facilitate the provision of notification by detaining officials to consular officials when required.

Notification at the Foreign National's Option

In all cases, the foreign national must be told of the right of consular notification and access. The foreign national then has the option to decide whether he/she wants consular representatives notified of the arrest or detention, *unless* the foreign national is from a "mandatory notification" country. The mandatory notification countries are listed on page 5 and in Part Five of this booklet.

If the detained foreign national is a national of a country not on the mandatory notification list, the requirement is that the foreign national be informed without delay of the option to have his/her government's consular representatives notified of the detention. *If the detainee requests notification, a responsible detaining official must ensure that notification is given to the nearest consulate or embassy of the detainee's country without delay.*

Mandatory Notification

In some cases, "mandatory notification" must be made to the nearest consulate or embassy "without delay," "immediately," or within the time specified in a bilateral agreement between the United States and a foreign national's country, *regardless of whether the foreign national requests such notification.* Mandatory notification requirements arise from different bilateral agreements whose terms are not identical. The exact text of the relevant provisions on mandatory notification in our bilateral agreements is reproduced in Part Five of this booklet.

Foreign nationals subject to mandatory notification requirements should otherwise be treated like foreign nationals not subject to the mandatory notification requirement. Thus, for example, the foreign national should be informed that notification has been made and advised that he/she may also specifically request consular assistance from his or her consular officials.

Privacy concerns or the possibility that a foreign national may have a legitimate fear of persecution or other mistreatment by his/her government may exist in some mandatory notification cases. The notification requirement should still be honored, but it is possible to take precautions regarding the disclosure of information. For example, it may not be necessary to provide information about why a foreign national is in detention. Moreover, *under no circumstances should any information indicating that a foreign national may have applied for asylum in the United States or elsewhere be disclosed to that person's government.* The Department of State can provide more specific guidance in particular cases.

Recordkeeping

Law enforcement agencies should keep written records sufficient to show compliance with the above notification requirements. These records should show all notifications to foreign consular representatives. In addition, in cases in which notification is at the discretion of the detained foreign national, these records should show that the foreign national was informed of the option of consular notification, the date when the foreign national was so informed, and whether or not the foreign national requested that consular officials be notified. If a confirmation of receipt of notification is available, it should be saved if possible.

The Department of State from time to time receives inquiries and complaints from foreign governments concerning foreign nationals in detention. The Department in such cases may request information from the relevant law enforcement officials on whether consular notification was in fact given. Concerns about consular notification may also be raised by foreign consular officials directly with the responsible federal, state, and local officials. Good recordkeeping will facilitate responding to these inquiries and to any consular notification issues that may be raised in litigation.

Consular Access to Detained Foreign Nationals

Detained foreign nationals are entitled to communicate with their consular officers. Any communication by a foreign national to his/her consular rep-

representative must be forwarded by the appropriate local officials to the consular post without delay.

Foreign consular officers must be given access to their nationals and permitted to communicate with them. Such officers have the right to visit their nationals, to converse and correspond with them, and to arrange for their legal representation. They must refrain from acting on behalf of a foreign national, however, if the national opposes their involvement. In addition, consular officers may not act as attorneys for their nationals.

The rights of consular access and communication generally must be exercised subject to local laws and regulations. For example, consular officers may be required to visit during established visiting hours. Federal, state, and local rules of this nature may not, however, be so restrictive as to defeat the purpose of consular access and communication. Such rules “must enable full effect to be given to the purposes” for which the right of consular assistance has been established.

The above requirements are set out in Article 36 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements.

Deaths of Foreign Nationals

If federal, state, or local government officials become aware of the death of a foreign national in the United States, they must ensure that the nearest consulate of that national’s country is notified of the death. This will permit the foreign government to make an official record of the death for its own legal purposes. For example, such notice will help ensure that passports and other legal documentation issued by that country are canceled and not reissued to fraudulent claimants. In addition, it may help ensure that the foreign national’s family and legal heirs,

if any, in the foreign country are aware of the death and that the death is known for estate purposes in the foreign national’s country.

The above requirements are set out in Article 37 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements.

Appointments of Guardians or Trustees for Foreign Nationals

Whenever a probate court or other legally competent authority considers appointing a guardian or trustee with respect to a foreign national who is a minor or an adult lacking full capacity, the nearest consular authorities for that national’s country must be informed without delay. The legal procedures for appointment of a guardian or trustee can proceed, but — if possible without prejudice to the appointment process — the consular authorities should be permitted to express any interest their government might have in the issue.

The above requirements are set out in Article 37 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements.

Accidents Involving Foreign Ships or Aircraft

If a ship or airplane registered in a foreign country wrecks or crashes in the United States, the nearest consular officials of that country must be notified without delay. This requirement is set out in Article 37 of the VCCR. Additional requirements may apply to particular countries because of bilateral agreements. Once notified, consular officials may undertake to coordinate contacts with the victims’ families or other emergency actions required by the foreign government concerned.

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